

No. 11024

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, as Administrator of the
Office of Price Administration,
Appellant,
vs.

A. G. E. ABENDROTH, doing business as Candy
& Tobacco House,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUN 12 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

CECELIA P. GALLAGHER
and F. E. WAGNER,

1215 Bedell Bldg.,
Portland, Oregon;

W. DUNLAP CANNON, Jr.,

1355 Market St.,
San Francisco, California,

For Appellant.

REUBEN G. LENSKE,

Yeon Building,
Portland, Oregon,

For Appellee.

In the District Court of the United States
in the District of Oregon

Civil No. 2564

CHESTER BOWLES, as Administrator of the
Office of Price Administration,

Applicant,

vs.

A. G. E. ABENDROTH, doing business as Candy
& Tobacco House,

Respondent.

AFFIDAVIT

State of Oregon

County of Multnomah—ss.

I, Cecelia P. Gallagher, being first duly sworn,
depose and say:

I am one of the attorneys for the above named applicant; I prepared the application on file herein for an order to permit inspection and copying of records; the application to the Court was made because the respondent herein had refused to permit duly authorized representatives of the Office of Price Administration to inspect and copy certain of his records which are required by regulations duly promulgated by the applicant administrator of the Office of Price Administration, to be made and kept for inspection; and because respondent had refused to comply with an inspection requirement issued by the applicant.

Such an inspection of the respondent's records was requested because I have received from many

people who purchase candy and tobacco products from the respondent complaints that they were being charged excessive prices, that they were being required to buy cigarettes in order to buy candy. I have talked with many small retailers who have stated that though they knew they were being overcharged on candy, Abendroth was their only source of supply and they had to pay his price or be without [1*] Many standard brands of candy bars, for which other wholesalers have a maximum price of \$0.75 a box, are being sold by respondent for \$0.85 or \$0.90 a box. From the information that is available to me, I am of the opinion that respondent's maximum price is also \$0.75 a box, but it is only from an inspection of his records that the maximum price can be shown.

Both customers and competitors of respondent have made numerous complaints to me, and to others in the Portland District Office of Price Administration, that respondent has consistently overcharged in his sales of candy and tobacco products.

On May 6, 1944 the Price Executive of the Portland District Office wrote to Respondent by registered mail, explaining in detail the method he was required to follow in order to establish his maximum prices and instructing him to make the necessary price filings on new items by May 15, 1944. I have inquired of the Price Executive and

*Page numbering appearing at foot of page of original certified Transcript of Record.

have been told that respondent has not made any price filings.

Although it is the position of the applicant that the Court has jurisdiction to issue an order of inspection upon a showing by the applicant that inspection and copying of records required by regulation to be kept have been refused, and that no showing of probable cause need be made by the applicant, I believe the foregoing is a sufficient showing upon which an order to inspect may be issued in this particular matter.

[Seal] /s/ CECELIA P. GALLAGHER

Subscribed and sworn to before me this 14th day of October, 1944.

/s/ W. A. STOCKMAN

Notary Public for Oregon

My Commission Expires Jan. 20th, 1947.

Service accepted Oct. 16, 1944.

REUBEN G. LENSKE,

Atty. for Respondent. [2]

[Endorsed]: Filed Oct. 16, 1944.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon

County of Multnomah—ss.

I, Cecelia P. Gallagher, being first duly sworn, depose and say:

I am one of the attorneys for the petitioner in

the above entitled matter, and have read the affidavit of A. G. E. Abendroth, filed herein.

On January 12, 1944, Investigator E. J. Singleton of the Office of Price Administration at my direction made his first call at the office of A. G. E. Abendroth, doing business as Candy and Tobacco House. At that time he talked with A. G. E. Abendroth and asked for permission to examine the records which establish the maximum and the selling prices of items named in Maximum Price Regulation 421 which governs the prices for certain food items sold at wholesale, and discussed with Abendroth his registration with the OPA under certain rationing regulations.

Said Singleton and Investigator Charles Harris made the following calls at the office of Candy and Tobacco House, and took from the office, with the permission of Abendroth, the following records:

January 20, 1944—126 purchase invoices from grocery file, returned Feb. 2, 1944.

February 2, 1944—53 customer invoice Books from August 3, 1943 to Sept. 4, 1943 returned February 22, 1944.

February 8, 1944—34 Misc. grocery Purch. Invoices, returned February 16, 1944.

February 16, 1944—8 Misc. grocery Purch. Invoices, returned February 23, 1944.

February 23, 1944—56 Customer Sales Invoice Books for September, 1943, 6 Outside Salesmen Sales Books, 23 Misc. Grocery Purch. Invoices, 1 Eatsum File. Returned the above 86 items February 28, 1944. [3]

February 28, 1944—81 Customer Sales Invoice Books, 1 Burry Purch. Invoice on Benson Hotel stationery. Returned the above 82 items 3/6/1944.

March 6, 1944—2 Outside Salesman Customer Invoice Books, returned March 15, 1944.

March 15, 1944—42 Misc. Customer Sales Invoice Books, 2 Eatsum Purch. Invoices, returned them March 20, 1944.

March 20, 1944—10 Misc. Customer Sales Invoice Books 1/14 to 1/25, returned March 29, 1944.

The purpose of the investigation conducted on and after January 20, 1944 was to determine whether or not there existed any violations of the price and record keeping requirements of Maximum Price Regulation 421 (Hereinafter referred to as MPR 421; this investigation was one of a series of investigations of all the wholesale houses in Portland, and with very few exceptions, the rest of the state of Oregon, with respect only to compliance with and violations of MPR 421.

Under the provisions of MPR 421, prices for food items are determined on the basis of the seller's purchases made immediately prior to August 5, 1943; while maximum prices for candy and tobacco products are determined under the General Maximum Price Regulation by the highest price at which the seller delivered the same kind of candy or tobacco during March 1942. Therefore, an examination of purchase records for the period of time which establishes the maximum price of groceries under MPR 421 reveals nothing concerning the maximum price of candy and tobacco

products under the General Maximum Price Regulation. An examination of sales records does not disclose compliance with or violations of maximum prices established by either of these regulations unless the sellers maximum price is known from an examination of his purchase records.

At the time the two investigators were investigating the records of respondent herein, they were instructed to and did limit their investigation to the question of compliance with or violation of MPR 421. This investigation was so limited because the examination of the records subject to the provisions of MPR 421 alone, the transcriptions thereof; the calculation of maximum prices therefrom; and the determination and computations of overcharges required the examination, transcription and calculation of approximately 6000 transactions. [4]

That as the examination of the records proceeded with respect to maximum prices established under MPR 421, it appeared that a sufficient number of substantial violations of MPR 421 had occurred and were occurring to require the institution of litigation for the purpose of requiring defendant to comply with that regulation. Said investigators were, therefore, instructed to and did proceed as expeditiously as possible to complete their investigations with respect to MPR 421. To have proceeded at the same time to investigate to the same extent the situation with respect to respondent's compliance with or violation of the General Maximum Price Regulation in his sales of candy and

tobacco products would have delayed conclusion of the investigation of compliance with MPR 421 for a substantial period of time during which it appeared that violations of MPR 421 would continue.

Immediately upon the completion of this investigation, on the 18 day of April, 1944, I wrote to Abendroth a letter advising him of the findings of the investigation. Immediately thereafter, I prepared a complaint for injunction and treble damages, and was at all times thereafter ready to file said complaint. I withheld the filing until August 4, 1944 for the single reason that the respondent, through Reuben Lenske, his attorney, requested, on a succession of occasions, for a succession of different reasons, that the filing of the complaint be delayed.

Dated at Portland, Oregon, this 18th day of October, 1944.

CECELIA P. GALLAGHER

Subscribed and sworn to before me this 18 day of October, 1944.

LOWELL MUNDORFF,

Clerk

By V. O. BISHOP,

Deputy Clerk.

[Endorsed]: Filed in open court Oct. 18, 1944.

[5]

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon

County of Multnomah—ss.

I, A. G. E. Abendroth, being first duly sworn upon oath, depose and say:

That I am the respondent in the above-entitled matter;

That prior to April 18th, 1944, two investigators from the Enforcement Division of the Office of Price Administration, Portland, Oregon, came to the place of business of respondent in the City of Portland and made certain representations, which are immaterial here;

That thereupon respondent permitted said investigators, the name of one of whom is E. G. Singleton, to examine any and all records of any and all kinds that respondent had; that said E. G. Singleton examined numerous invoices and other books and records of respondent; that said investigators also took from the place of business of respondent and to the Office of Price Administration numerous invoices and various records of defendant, presumably for investigation; that for approximately two months prior to April 10th, 1944, said two investigators worked upon and examined in detail the records of respondent; that no obstacles of any kind were placed in the way of said investigators, and that respondent aided and assisted said investigators in finding and locat-

ing the invoices and other information [6] from respondent's records;

That said investigators had full and free opportunity at said time to examine all of respondent's records that they desired, and that it is unreasonable and arbitrary and improper for applicant to seek or obtain further examination of any of the records of respondent;

That said investigation caused an interruption of business at considerable expense to respondent, and any further investigation would do likewise;

That it was not the intention of Congress to permit unreasonable and arbitrary subjection of businesses to investigations by applicant, and that this would be such unreasonable and arbitrary investigation;

That litigation is now pending between applicant and respondent in this very Court, and that it would be unfair and improper for applicant to obtain advantage by other or further investigation or examination of respondent;

That respondent has a small business, for the nature and kind of business it is, and has only three inside employees, and investigation on the part of the applicant requires the expenditure of time by respondent and his employees, which respondent cannot afford.

A. G. E. ABENDROTH

Subscribed and sworn to before me this 29th day of September, 1944.

[Seal]

R. G. LENSKE

Notary Public for Oregon

My commission expires: July 1, 1944.

Service accepted September 29, 1944.

CECELIA P. GALLAGHER

Attorney for Applicant

By A. STOCKMAN

[Endorsed]: Filed Sep. 30, 1944. [7]

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon

County of Multnomah—ss.

I, A. G. E. Abendroth, being first duly sworn, depose and say:

That I have read the affidavit of Cecelia P. Gallagher and deny the statements therein except insofar as they agree with the facts as herein set forth, and I further make note that no names of any kind are set forth in said affidavit; that I deny that I have been selling candies at higher than prices fixed under the price regulations, and that I further state as follows:

That for approximately two months my books and records, including all of my invoices, without exception were under the control and subject to

the inspection of two investigators under the Office of Price Administration of the Portland District; that whatever of any invoices or other records of affiant that said investigators desired, I permitted them to take to their own office for further examination; that said investigators examined invoices covering candy purchases and sales as well as numerous other items purchased and sold by affiant in his business;

That I discussed the matter of specific candy sales with Cecelia P. Gallagher prior to the time that the investigators examined records of affiant; that full and free opportunity was given [8] to and at least in part was taken advantage of by said investigators in examining records of affiant;

That the fact that said investigation was made during said two months period this year took a great deal of the time of affiant and also some of the time of affiant's office help; that affiant has a very small business compared to the vast majority of similar type of businesses in the Portland area, and that affiant has only two persons working in his office besides himself, and that it not only entails an expense on the part of affiant to be submitted to examination, but also effects a serious disruption of his business;

That affiant firmly believes that he has not violated and is not violating any OPA regulations respecting his sales of candy, and that he at no time concealed prices from customers or from OPA questioners or from any one interested; that affiant, together with other persons in the same line of

business, is suffering from a shortage of cigarettes and has not and does not require the purchase of cigarettes by a customer in order that said customer may be sold candy; that affiant is not the sole source of supply for any retailer of any of the products that he sells, and because affiant is a comparatively small business, the principal sources of supply of candy and cigarettes and groceries are through the other sources and not through affiant;

That I have just read the affidavit of October 14th, 1944, and this is the first time that it has ever been mentioned to me that there is something further to be done on my part with respect to price filings; that I have to the best of my knowledge complied with all requirements in that respect, but I intend to immediately check into the matter further, and if there is anything further to be done on my part along that line, I shall do so promptly;

That to permit the Office of Price Administration to cause me the expense and time of being investigated twice for the same [9] period of time at sacrifice to myself would not be just to me and would be granting an arbitrary and unreasonable right which would cause an undue hardship against affiant, even if it were possible for the Price Administrator to find some errors on the part of affiant.

[Seal]

A. G. E. ABENDROTH

Subscribed and sworn to before me this 17th day of October, 1944.

R. G. LENSKE

Notary Public for Oregon

My commission expires July 1, 1945.

Service accepted this 17th day of October, 1944.

CECELIA P. GALLAGHER

Attorney for Applicant

[Endorsed]: Filed Oct. 18, 1944. [10]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

It appearing from the application filed herein and the annexed affidavit of Charles Craig, that the Respondent, after request made upon him for permission to inspect and copy certain specified records and after the service upon him of an inspection Requirement issued and signed by the Administrator for the Office of Price Administration, has refused and does still refuse to permit the inspection and copying of said specified records;

And the Court being fully advised in the premises, it is hereby

Ordered that the Respondent appear and show cause on the 2nd day of October, 1944, at the hour of 10 o'clock A. M., before the undersigned Judge of the United States District court of the District of Oregon, why an Order should not be made requiring the respondent to permit duly authorized

representatives of the Office of Price Administration to inspect and copy the following records: Each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco during the month of March, 1942; also each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco to all customers of respondent between the dates of November 1, 1943 to and including August 22, 1944; also each and every original purchase invoice in possession of respondent showing purchases of candy and candy products, gum, cigars, cigarettes and tobacco from his various suppliers between the dates of November 1, 1943 to and including August 22, 1944.

Dated this 19th day of September, 1944.

/s/ CLAUDE McCOLLOCH

United States District Judge.

[Endorsed]: Filed Sept. 19, 1944. [11]

[Title of District Court and Cause.]

ORDER OF DISMISSAL

On this 5th day of December, 1944, this cause comes on to be heard before the Court for final disposition herein, and the Court being advised and having enjoined defendant from further violations in the companion cause Number Civil 2532, Chester Bowles Vs. A. G. S. Abendroth, etc.

It Is Ordered that the application requiring the respondent to permit further inspection of inventory and records be, and the same is hereby, denied; and,

It Is Further Ordered that the above cause be, and the same is hereby, dismissed.

Dated at Portland, Oregon, this 5th day of Decembr, 1944.

(Signed) CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed Dec. 5, 1944. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To A. G. E. Abendroth, respondent above named and to Reuben G. Lenske, his attorney.

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, applicant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain order dismissing said action, made and entered in the above entitled action on the 5th day of December, 1944.

Dated at Portland, Oregon, this 24th day of February, 1945.

/s/ F. E. WAGNER

/s/ W. DUNLAP CANNON, JR.

Attorneys for Appellant

Chester Bowles,

Administrator

[Endorsed]: Filed Feb. 24, 1945. [13]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the plaintiff above named and as appellant in the above entitled action submits the following as his Designation of Record on the appeal of said matter to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Plaintiff's Affidavits filed October 16 and October 18, 1944

2. Defendant's Affidavits filed September 30 and October 18, 1944

3. Order to Show Cause

4. Order of Dismissal

5. Transcript of Hearing on Motion for Order to Show Cause October 2, 1944

6. Transcript of Hearing on Motion to Dismiss, October 18, 1944

7. Notice of Appeal

8. This Designation

Dated at Portland, Oregon, this 23rd day of March, 1945.

/s/ F. E. WAGNER

Of Attorneys for Appellant

[14]

State of Oregon

County of Multnomah—ss.

L

Due service of the foregoing Designation of Record is hereby accepted by receipt of a duly certified copy thereof in Portland, Oregon, this 23d day of March, 1945.

/s/ REUBEN G. LENSKE

Of Attorneys for Defendant

[Endorsed]: Filed March 23, 1943. [15]

CLERK'S CERTIFICATE

United States of America

District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 16 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2564, in which Chester Bowles, as Administrator of the Office of Price Administration is plaintiff and appellant, and A. G. E. Abendroth, doing business as Candy & Tobacco House is defendant and appellee; that said transcript has been prepared

by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed duplicate transcripts of the testimony taken in this cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of March, 1945.

[Seal]

LOWELL MUNDORFF,

Clerk

By F. L. BUCK,

Chief Deputy [16]

In the District Court of the United States
for the District of Oregon

Civil No. 2564.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

A. G. E. ABENDROTH, doing business as Candy
and Tobacco House,

Defendant.

Portland, Oregon, Monday, October 2, 1944.

10:35 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Miss Cecelia P. Gallagher, Attorney for the
Plaintiff.

Mr. Reuben G. Lenske, Attorney for the
Defendant.

Alva W. Person, Court Reporter.

INSPECTION ENFORCEMENT PROCEEDINGS

The Court: Mr. Lenske.

Mr. Lenske: I am here in connection with the
application [1*] for the examination by the OPA

*Page numbering appearing at top of page of original Reporter's
Transcript.

of records of A. G. E. Abendroth, doing business as Candy and Tobacco House, Civil 2564.

The Court: And you are here with an order in another case, Mr. Skulason?

Mr. Skulason: Yes, your Honor.

The Court: You want to be heard, Mr. Lenske?

Mr. Lenske: Yes. If it please the Court, this case comes up on the application of the Administrator, and the following are the facts:

The defendant in this case, and respondent, is a defendant in a suit that is pending before this Court at the present time.

The Court: No appearance in the other case, is there?

Mr. Lenske: Oh, yes.

Miss Gallagher: That motion to dismiss was brought to your Honor last week. There has been no answer filed since that time.

The Court: There was no appearance, was there?

Mr. Lenske: No. Here is what happened on this, your Honor.

The Court: Let me clear my mind. I carried forward a case, a companion to Mr. Skulason's. Is this the one?

Miss Gallagher: That is this one.

The Court: At that time there was no appearance, was there?

Miss Gallagher: That is right. [2]

The Court: Since then there has been?

Miss Gallagher: Since that affidavit was filed Mr. Lenske was here. The order was set by your

Honor to show cause, setting the time down for today.

The Court: All right.

Mr. Lenske: I might say, your Honor, the notice of this matter having come up last Monday apparently was mailed out by registered mail Friday of the previous week.

The Court: All right.

Mr. Lenske: It didn't reach the defendant in the case until Tuesday, which was the day after——

The Court: All right. Go ahead. Don't waste any time.

Mr. Lenske: There is already pending a suit for \$15,000 treble damages between the Administrator and the defendant in this case, and that case is pending in this Court. The defendant is in the grocery business, principally small wholesale grocery, and about March or April of this year the two investigators from the Office of Price Administration came to the defendant, or respondent,——

The Court: You don't need to take this, unless requested to.

Miss Gallagher: Mr. Wagner has requested that we do have it taken down.

Mr. Lenske: In March or April of this year the two investigators from the Office of Price Administration examined [3] the records of the defendant.

The Court: Why don't you let them see your records? Can't we short-cut this?

Mr. Lenske: No. We feel it would be just arbitrary and improper if a further examination of the record at this time were made. All of the records

of the defendant were available to them in the spring of this year. As a matter of fact, boxes of invoices, I understand, were taken from the place of business to the Office of Price Administration so they could examine them there at their greater leisure and over a period of two months, I believe, the Price Administrator did investigate, did have the records and did examine them. Now doing a matter of that kind causes disruption of business. It is only a small business. There are only three persons working inside.

The Court: Why did you need to see them again, Miss Gallagher?

Miss Gallagher: Your Honor, the records which were examined in March and April of this year are the invoices showing the purchases, and the invoices showing sales of groceries that are regulated under the price regulation 421, canned goods, cookies, crackers, things like that. We did have those records. We examined them. We have filed a suit, an action, based on our findings in that examination. The records we are requesting this time are the purchase records and the [4] sales records of sales of candy, tobacco, cigars and cigarettes, candy and candy products. Those products are regulated under the General Maximum Price Regulation. Those records we have never had an examination of. Two years ago we had a very brief discussion—or we had several discussions with Mr. Abendroth on his candy prices. At that time we did look at a few records, but no extensive investigation has ever been made of his purchases

and his sales of candy. Those that we examined before are on products controlled by an altogether different regulation and we have not looked at these.

The Court: Now let me hear Mr. Skulason and I will come back to your case.

Miss Gallagher: All right.

(Another matter was here taken up but shortly interrupted, as follows:)

The Court: I don't think I need to keep Mr. Lenske here. What is the number of your companion case, Mr. Lenske, the principal case? 2564 is your supplemental proceeding.

Mr. Lenske: I will give that to your Honor in a second. 2532.

The Court: Yes. Have the pleadings been made up in that case?

Mr. Lenske: Well, no. We just argued a motion on that last Monday and no order has been entered on that yet. [5]

The Court: Argued a motion before whom?

Mr. Lenske: Before your Honor. It was a motion to dismiss one of the causes of action, to require a bill of particulars.

The Court: Well, I ruled on your motion?

Mr. Lenske: You ruled on the motion. You reserved one.

The Court: Reserved it until pre-trial.

Mr. Lenske: You reserved one until trial and overruled another.

The Court: Yes. That is the treble damage case?

Mr. Lenske: Yes.

The Court: Yes.

Mr. Lenske: Well, I will have an answer in sometime during the week.

The Court: Now then, did we give it a pre-trial date?

Mr. Lenske: No.

The Court: Is a jury demanded in the case?

Miss Gallagher: Not by us, your Honor.

Mr. Lenske: There isn't yet. I don't know whether there will be. I will have to find out.

The Court: All right. Then I will tell you what you do: You get your answer in this week. You say you can do it.

Mr. Lenske: Yes.

The Court: All right. You will be up here next Monday, without doubt, Miss Gallagher, and his answer is going to come in this week, and next Monday you remind me of this [6] case again.

Miss Gallagher: Yes, your Honor.

The Court: Intervening events will determine what I will do with it. All I want to be sure of now is that you get your answer in this case this week.

Miss Gallagher: It is perfectly clear these are two separate and distinct cases, your Honor?

The Court: One of them is a proceeding for discovery and the other is a trial of a damage issue.

Miss Gallagher: Yes, but the discovery is aimed toward a different particular and a different set of circumstances than the case which is already filed.

The Court: Oh, it is?

Miss Gallagher: Yes, your Honor.

The Court: Oh, I see. So if you get the information you want you will bring another case against him?

Miss Gallagher: That is right.

The Court: Oh, I see. Well, now then——

Mr. Lenske: Of course, we feel this way, your Honor: They had complete and absolute cases, and our records, and did examine even those records to some extent, and the Court has discretion in the matter. It would be an improper use of the discretion to permit them to go piecemeal and disrupt our business some more when they had full and fair opportunity to completely, in all respects, examine in all respects. [7] Candy is only part of the grocery store anyhow. To say one day, "We will take all your records of milk", and another day, "We will take all your records", and so forth, and in particular after time elapsed, I think is an improper method of doing business on the part of the Administrator. They had that right so far as they went, and at that time they exercised it, and it would be improper for them to go ahead now and disrupt our business further by asking for our records and asking us to give them to them again. They had two months on the other.

The Court: Now on separate cases I won't rule. I will hear Mr. Skulason now but defer this. You don't need to wait any further, unless you want to.

Mr. Lenske: All right.

(Thereupon, at 10:47 o'clock A. M., this matter was adjourned.) [8]

Wednesday, October 18, 1944, at 9:40 o'clock A. M., the following proceedings herein were had:

The Court: I will hear you, Mr. Lenske.

Mr. Lenske: If it please the Court, ask the Court to bear in mind I filed a motion for dismissal of the order to show cause, along with a counter-affidavit, and I would like to just point out to the Court that I think there is a question of jurisdiction involved here also, as well as a question of discretion, in the event that the Court does have jurisdiction. In other words, I have two points. One in my motion is the question of the jurisdiction of the Court, and then in addition to that question, if the Court does have jurisdiction, as to whether it should exercise its discretion in issuing the order for inspection.

On the question of jurisdiction, I have two points. One of them is that the act itself, as I gather it, says that the Court has jurisdiction where subpoena has been issued. In this case there had been no subpoena issued by the Administrator. It was an order of inspection, which, I take it, is different than a subpoena. A subpoena, I presume, would give a person certain rights. Of course it might require him to bring in his records and permit them to be looked at at the time, or at any rate there is a difference between a subpoena and an inspection, and, as [9] I read the regulation, or the statute—rather, the statute—it gives jurisdiction only where there has been a subpoena issued. So far as a situation of this kind pertains, there has been no subpoena issued, nothing in the

files, or in the affidavits, that would show that a subpoena has been issued.

My point No. 2, so far as the jurisdiction question is concerned, is that there is nothing in the affidavits of specific character other than generalities which would give the Court jurisdiction, hearsay generalities, and nothing specifically in the affidavits.

No. 3—and as to No. 3 I am speaking generally from just a general glance at the first page of an affidavit that was just handed to me by Miss Gallagher, which in itself, I take it, just from a casual glance, without reading it, shows on its face that they have had full and free opportunity to examine the records of affiant and that it would be an abuse—well, this goes principally to the second proposition, that it would be an abuse of discretion.

I might tell your Honor that, on that particular point, Mr. Abendroth is in the courtroom here and if the Court should like to hear from him under oath I will be glad to submit him for such enlightenment as the Court might be willing to listen to.

The points on that particular score are that our affidavit shows, our counter-affidavit filed yesterday shows [10] that prior to the time that the two investigators went to investigate the defendant in this case he had discussions with persons, with the OPA including Miss Gallagher, regarding candy sales as well as other items that he sold in his store, and Mr. Abendroth is here to substantiate that under oath.

No. 2: When they came to investigate him he

permitted them to take, and the affidavit just handed to me indicates numerous records, voluminous records, and he is prepared to testify that they took books, files and invoices—that there wasn't any segregation of the particular invoices—took books, files and invoices to their offices, which he voluntarily permitted them to have, and over a period of two months they examined those records, and also examined records in his place of business; gave him no restrictions of any kind whatsoever; and candy sales as to these records, at least some of the records included records of candy sales and the candy sales were discussed.

Now he has a comparatively small business for his type of business. He has only two employees in his office besides himself, and help is difficult to obtain, as I believe the OPA believes. This is the case they have difficulty in getting help, and every investigation, every matter of this kind, does involve a sacrifice on the part of office help and on the part of himself. In trying to make a go of that business he needs every minute that he can get of the help of [11] his employees in proceeding with the business, and it would be unnecessary and unjust, and an arbitrary matter to permit examination and re-examination and inspection of records, and going into a matter which they had free and full opportunity to do. A question had been raised concerning candy sales as well as sales of other types of merchandise handled by a small wholesale grocer.

These are the points, in brief, your Honor, and, as I say, Mr. Abendroth is here ready to testify as to what the actual facts are concerning it. Based on the testimony I would like to have him adduce, and upon the points involved, I don't believe the Court should allow an order of inspection at this time.

Miss Gallagher: Your Honor, I have handed to Mr. Lenske, and have ready to file with you, with the Court, an affidavit signed by myself. It has not yet been acknowledged. May I acknowledge it in open court, and do I do it before the Clerk?

The Court: The Clerk can administer an oath.

(The Clerk here administered the oath to Miss Gallagher.)

Miss Gallagher: The point raised by Mr. Lenske on the question of jurisdiction can be briefly disposed of. I should like to submit this affidavit now, if you please.

I quoted from the Emergency Price Control Act at a former time. I shall quote it again, so that it can go into [12] this record.

Section 202(b) of the Act says that the "Administrator is authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents. The Administrator

may administer oaths and affirmations and may, whenever necessary, by subpoena, require a person to appear and testify or to appear and produce documents, or both, at any designated place."

Section (e) provides that "In case of contumacy by, or refusal to obey a subpoena served upon any person referred to subsection (c)".

Subsection (c) says that "For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify, or to appear and produce documents, or both, at any designated place".

Continuing, "the District Court for any district in which such person is found resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and [13] any failure to obey such order of the Court may be punished by such Court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b)".

The important part of subsection (b) is, I think, that the Administrator "may require any such person to affirm the inspection and copying of records and other documents".

Jurisdiction is granted to the District Court to enforce such an inspection and copying of records, as well as to enforce the obedience to a subpoena. There the same question that has arisen under the

question of jurisdiction to a question of issuing an order to inspect and copy records, has been up before other District Courts over the United States and such orders have been granted, and the question that goes to the discretion of the Court in allowing such an order to be issued, or issuing such an order.

We have stated Mr. Abendroth's affidavits that have been filed in this case, and the one which I have filed this morning sets out in detail the examination that he alleges that he did make during the first two months' period the first of this year. Our affidavit will show that Mr. Singleton, an investigator in our office, made his first call on Mr. Abendroth's store on the 12th of January. At that time he discussed with him his prices under Maximum Price Regulation 421 and some rationing which had arisen. The ration- [14] ing questions are not involved in any of these cases. Mr. Singleton asked and received the permission of Mr. Abendroth to examine records. He asked for the records that would establish what his ceiling prices and what his maximum prices under Maximum Price Regulation 421 were.

Thereafter, Mr. Singleton and another investigator, Mr. Harris, both working under my direction, called at the Abendroth office and storeroom and from time to time took certain bundles of purchase invoices or sales invoices from the store, handing to Mr. Abendroth a receipt for them, and then after some examination of them and transcriptions of

them returned them to the store and took out another bundle. The important thing about this first investigation, and it is set out in the affidavit, is that there was an investigation to determine the compliance with or any violations of Regulation 421 which controls prices of certain food items, grocery items, sold at wholesale. It was part of a series of investigations that our office made in all of the wholesale houses in Portland, large and small, and with very few exceptions of all wholesale houses selling groceries in the whole State of Oregon. It was concerned solely with the Regulation 421. It is true that in the sales invoices that were examined there were a number of sales of candies that an examination of the——

The Court: Your client asks if he may come inside. Certainly [15] he may.

Miss Gallagher: Under 421, the grocery Regulation, maximum prices are established by the seller's purchases of a food covered by the regulation during the period immediately surrounding August 5, 1943, his net cost at that time, plus a certain markup as its maximum price from there on out for certain grocery items covered by 421. Candy prices are established by what is called the General Maximum Price Regulation and established by the seller's highest price for the sales of the same kind of candy or tobacco products, or a similar kind, during March of 1942. So that an examination of the records from August 5th, 1943, which are these that were taken from the records of the respondent, and examined and transcribed,

would, in no way, disclose the maximum prices for candy or the highest selling price of the respondent during March of 1942. It is alleged by the respondent that we could have and should have continued our investigation and done everything necessary to be done under all the regulations applying to the respondent at the time we made our examination. The investigators transcribed and studied some 6,000 transactions under 421 Regulation. Transcriptions were a long-drawn-out piece of work, of which we are not complaining. That is our job. However, if we had taken the time then to have gone back to March, 1942, records for maximum prices, and then at the same time had continued our examination under [16] General Maximum Price Regulation to determine the sales of candies, our investigation would have lasted a considerable length of time more. We would have been delayed in consummating the regulation examination we were then making, which would quite conceivably have thrown us out of a chance to have filed a case, if a case were necessary to be filed under our statute.

Immediately after we finished our investigation and on April 18th, I wrote a letter to Mr. Abendroth, in which is set out in detail the findings of our investigation. Immediately after that I drew a complaint ready to be filed. It was on April 27th that Mr. Reuben Lenske, who represented Mr. Abendroth, first called upon me, and thereafter from time to time the filing of the com-

plaint was delayed at the specific request of Mr. Lenske, on behalf of Mr. Abendroth.

I have filed another affidavit, which states that we have reason to believe that General Maximum Price Regulation has been violated by Mr. Abendroth in his sales of candy and tobacco products. Unless we have an opportunity to examine his purchase records of March of 1942, and sales records since that time, we shall be unable in any way to say whether there are the violations which we think do exist.

The Court: What is the nature of that?

Miss Gallagher: It is a treble damage injunction suit.

The Court: Is it ready for trial? [17]

Miss Gallagher: The answer is filed, isn't it?

The Court: It is ready for trial, isn't it?

Mr. Lenske: Yes.

The Court: Maybe I had better go in and try that. How much is involved in that case?

Miss Gallagher: How much did we ask for in that case?

The Court: Yes.

Mr. Lenske: \$15,000, about.

The Court: How soon could you try it, Mr. Lenske?

Mr. Lenske: Next month, about the 15th.

The Court: When could you try it, Miss Gallagher?

Miss Gallagher: I could try it any time, I think, your Honor, after the 10th of November.

The Court: Why, you have other cases.

Miss Gallagher: Oh, I have seven cases on trial, on your docket, for the 14th of November.

The Court: You mustn't get too much work to tire yourself out. We had better try one case before we get another one. I can try it at any time and you can try it at any time before then?

Miss Gallagher: Yes, your Honor. I could conceivably go to trial next week.

The Court: And you?

Mr. Lenske: Well, I can't, without substantial sacrifice, your Honor. [18]

The Court: What do you mean, sacrifice?

Mr. Lenske: Well, I have so much lined up, and this case will take me a week's work in order to prepare for trial.

The Court: What is next Tuesday, the 23rd?

The Clerk: The 24th, your Honor.

The Court: We can try it in a day, can't we?

Miss Gallagher: That I am sure we can, your Honor.

Mr. Lenske: Well, I doubt it, your Honor. There are numerous items claimed by the plaintiff, and just how it will shape up I can't say at the present time.

The Court: That is what I would like to see. I would like to get the slant on what the plaintiff is able to establish against your client before I put him under the gun of the second investigation. I am trying to do you a favor.

Mr. Lenske: Well, I appreciate that.

The Court: Well then, you had better cooperate

and get ready for trial next week. Can you do it some day next week?

Mr. Lenske: Well, I would be glad to, if I could, your Honor.

The Court: Well, I will have to do my own setting, then, if you are not able to be more definite than that. We will try it on Monday afternoon, the 30th, beginning Monday afternoon, the 30th, at two o'clock in the afternoon.

Miss Gallagher: Oh, your Honor, that is one day next week. I could not. I should be in San Francisco. [19]

The Court: That is not next week.

Miss Gallagher: The 29th, 30th and 31st of October I shall have to be in San Francisco.

The Court: Then I won't set it at all. I will take it under advisement. We will recess now for a few minutes.

(Thereupon, the foregoing hearing was concluded at 10:04 o'clock A. M.) [20]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, certify that the pre-trial proceedings in the case of Chester Bowles, Administrator, Office of Price Administration, Plaintiff, vs. A. G. E. Abendroth, doing business as Candy and Tobacco House, Defendant, Civil No. 2564, were held on Monday, October 2, 1944, and Wednes-

day, October 18, 1944, before the Honorable Claude McColloch, Judge; that I reported all of said proceedings, and the foregoing twenty pages, numbered 1 to 20, both inclusive, contain a full, true and impartial record of said proceedings.

Dated at Portland, Oregon, this 14th day of March, A. D. 1945.

/s/ ALVA W. PERSON

Court Reporter

[Endorsed]: Filed March 23, 1945. [21]

[Endorsed]: No. 11024. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, as Administrator of the Office of Price Administration, Appellant, vs. A. G. E. Abendroth, doing business as Candy & Tobacco House, Appellee.

Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon. Filed April 3, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 11024

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

v.

A. G. E. ABENDROTH, Doing business as Candy
& Tobacco House,

Appellee.

STATEMENT OF POINTS

On the appeal taken in the above entitled action the appellant, Chester Bowles, Administrator of the Office of Price Administration, will urge and rely upon the following points:

1. The Court erred in failing and refusing to grant appellant's application for an order requiring defendant to permit appellant's representatives to inspect and copy the defendant's records as prayed in the complaint.

2. The Court erred in dismissing the action.

HERBERT H. BENT

Acting Regional Litigation
Attorney

FRANZ E. WAGNER

District Enforcement Attor-
ney

Attorneys for the Appellant.

[Endorsed]: Filed May 29, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herein designates the entire certified transcript, including all exhibits, to be contained in the printed record on appeal herein.

HERBERT H. BENT

Acting Regional Litigation
Attorney

F. E. WAGNER

District Enforcement
Attorney

Attorneys for the Appellant.

[Endorsed]: Filed May 29, 1945. Paul P.
O'Brien, Clerk.